In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1569

GLEN MANOR HOME FOR THE JEWISH AGED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The sole question presented by the petition is whether the Board properly asserted jurisdiction over petitioner, a non-profit nursing and rest home. The relevant facts are as follows:

Petitioner ("the Home") operates a facility licensed by the City of Cincinnati, Ohio, as a nursing and rest home (Pet. App. A15, n. 2; A. 21-22).[1] It has accommodations for 82 persons, and employs a nursing staff of 17 which provides around-the-clock daily care to its residents (Pet. App. A15, n. 2; A. 31-32, 99-100). The Home has no major medical facilities; if residents become

[1] "A." refers to the printed appendix used in the court below. A copy has been lodged with the Clerk of this Court.

critically ill they are discharged to a hospital or a private nursing home (Pet. App. A16). In a representative yearly period, the Home had gross revenues in excess of $342,000, of which $60,000 were obtained from Medicaid, a program administered by the State of Ohio and funded in substantial part by the Federal Government (Pet. App. A16, n. 2; A. 16-17). During the same period, the Home paid $18,000 to the Cincinnati Gas and Electric Company, and $2,400 to Cincinnati Bell, both of which are engaged in interstate commerce within the meaning of the National Labor Relations Act (Pet. App. A16, n. 2; A. 18-19). During fiscal year 1970, the Home purchased $20,000 in goods from Shillito's Department Store in Cincinnati, which is owned by Federated Department Stores and is also engaged in interstate commerce (Pet. App. A16, n. 2; A. 20-21).

On July 12, 1971, the Union (Local 1099H of the Retail, Wholesale and Department Store Union) filed a petition with the Board's Regional Office, requesting that a representation election be held among the service and maintenance employees employed by the Home (Pet. App. A 3). After an evidentiary hearing, the Regional Director ruled that the Home was a nursing home engaged in commerce within the meaning of the Act, and that it met the Board's standards for the assertion of jurisdiction set forth in *University Nursing Home, Inc.*, 168 NLRB 263 (Pet. App. A16, n. 2). He directed an election which the Union won (A. 114), and the Board certified it (A. 112-113). The Home refused to bargain with the Union, and, in a subsequent unfair labor practice proceeding, the Board found that the Home thereby violated Section 8(a)(5) and (1) of the Act (A. 128-140). The Board ordered the Home to bargain with the Union (A. 137-138).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A2-A9).

2. The court below correctly rejected petitioner's contention (Pet. 7-14) that the exemption for non-profit hospitals in Section 2(2) of the Act, 29 U.S.C. 152(2),[2] encompasses nursing homes. As this Court recognized in *Office Employees International Union, Local 11* v. *National Labor Relations Board*, 353 U.S. 313, 318-319, Congress, in amending Section 2(2) in 1947, deliberately decided not to exempt all non-profit employers, but to limit the exemption to non-profit hospitals. Petitioner's quotations from the legislative history of the bill indicate that certain Senators in 1947 considered that few hospitals or non-profit organizations would be engaged in interstate commerce. The Congress, however, specifically limited its exemption to non-profit hospitals, choosing neither to exempt all hospitals nor other non-profit employers.[3]

There is no indication that Congress intended the term "hospital" to have other than its usual, accepted meaning. When Senator Tydings introduced his amendment exempting non-profit hospitals, he explained that "this amendment is designed merely to help a great number of hospitals which are having very difficult

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[2] Section 2(2) provides in relevant part: "The term 'employer' * * * shall not include * * * any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual * * *."

[3] Thus, the House Bill excluded from coverage "* * * any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *." 1 Leg. Hist. of the Labor-Management Relations Act (1947) 161. The Senate, however, limited the exemption to non-profit hospitals, and the Senate version was enacted. 1 Leg. Hist. (1947) 229, 536.

times."[4] Had Congress desired to accord similar status to the health care industry generally, it would have said so.

3. Petitioner also contends (Pet. 23) that the Board's $100,000 gross revenue standard for asserting jurisdiction over nursing homes is arbitrary because "there seems to be no objective standard or uniform yardstick used by the Board in determining the size of the jurisdictional mininum applied to a particular class of employers." The Board applies the same criteria in all industries in determining the appropriate jurisdictional amount—"to extend the benefits and protections of the Act to employers, employees, and labor organizations in this industry to the fullest extent possible without unduly burdening the Board's processes, its workload, or its budgetary limitations." *University Nursing Home, supra,* 168 NLRB at 264. But since industries vary widely in the number of firms operating at particular dollar volumes and the degree to which employment is concentrated in particular firms, the same dollar yardstick cannot be used for all industries without excluding from the Act's coverage a greater proportion of employees in one industry than in another.[5] The Board had rational grounds for establishing a $100,000 gross revenue standard for asserting jurisdiction over nursing homes. As the Board stated in *University Nursing Home, supra,* 168 NLRB at 264 (footnotes omitted):

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[4] Pet. 7-8; 93 Cong. Rec. 4997, 2 Leg. Hist. (1947) 1464.

[5] In 1959, Congress specifically approved the Board's use of dollar yardsticks for different industries for the purpose of determining when to assert jurisdiction. See Section 14(c)(1) of the Act, 29 U.S.C. 164(c)(1) (Pet. App. A14); *Siemons Mailing Service,* 122 NLRB 81.

We find that it will effectuate the policies of the Act to limit our exercise of jurisdiction to those cases involving proprietary nursing homes and related facilities providing skilled nursing health care, and convalescent services, where the Employer involved receives at least $100,000 in gross revenues per annum. On the basis of such information as is available to us and as has been brought to our attention in the briefs of the parties, we are satisfied that application of this standard will provide effective coverage over a significant portion of the nursing home industry to a substantially like extent that the $250,000 gross revenue standard provides coverage over a significant portion of the proprietary hospital industry. Were we to set a $250,000 gross revenue standard for the nursing home industry, it would confine our asserted jurisdiction to a segment of that industry so small as to have little constructive impact on the labor relations of the industry as a whole, thereby failing to effectuate our policy determination to extend the benefits and protections of the Act to employers, employees, and labor organizations in this industry to the fullest extent possible without unduly burdening the Board's processes, its workload, or its budgetary limitations.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JULY 1973.